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Nos. 87-976, 87-977, 87-978, 87-979, and 87-1091

In the Supreme Court of the United States

OCTOBER TERM, 1987

Supreme Court, U.S.
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INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

TEXAS EASTERN TRANSMISSION CORPORATION, PETITIONER

v.

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SHELL OFFSHORE INC., ET AL., PETITIONERS

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

CATHERINE C. COOK
General Counsel

JEROME M. FEIT
Solicitor

JOHN N. ESTES III
FRANK R. LINDH
Attorneys
Federal Energy Regulatory Commission
Washington, D.C. 20426

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether, upon determining that interstate natural gas pipelines were engaging in an unduly discriminatory and anticompetitive practice by refusing to provide transportation services to companies that choose to purchase natural gas from producers and other sellers rather than from the pipelines themselves, the Federal Energy Regulatory Commission correctly concluded that it had the statutory authority to eliminate such unlawful discrimination by requiring pipelines that transport gas under certain expedited regulatory procedures to offer transportation service on an "open access" basis.

2. Whether the court of appeals properly remanded to the Commission, for further consideration and explanation, the Commission's decision to take no action at this time with respect to the "take-or-pay" provisions in contracts between natural gas producers and interstate pipelines.

3. Whether the Commission acted within its statutory authority in establishing an optional expedited certificate procedure to ease regulatory barriers that would otherwise obstruct the provision of new pipeline services.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-128a) is reported at 824 F.2d 981.[1] The orders of the Federal Energy Regulatory Commission are reported at 50 Fed. Reg. 42408 (1985); as corrected, 50 Fed. Reg. 45907 (1985); on reh'g, 50 Fed. Reg. 52217 (1985), 51 Fed. Reg. 6398, 11566, and 11569 (1986).

JURISDICTION

The judgment of the court of appeals was entered on June 23, 1987, and petitions for rehearing were denied on September 15, 1987. The petitions for a writ of certiorari in Nos. 87-976, 87-977, 87-978, and 87-979 were filed on December 14, 1987. The petition for a writ of certiorari in No. 87-1091 was filed on December 11, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A. Statutory and Regulatory Background

1. The Natural Gas Act (NGA), 15 U.S.C. 717 *et seq.*, gave the Federal Energy Regulatory Commission comprehensive regulatory authority over companies that engage in either the sale of natural gas for resale or the interstate transportation of natural gas. That authority extends to both gas producers, which produce and sell natural gas, and natural gas pipelines, which transport and sell natural gas.

The Commission regulates market entry through its authority under Section 7 of the NGA, 15 U.S.C. 717f, to issue certificates of public convenience and necessity, subject to such conditions as the Commis-

[1] "Pet. App." refers to the joint appendix to the petition for a writ of certiorari in No. 87-976.

sion deems appropriate, authorizing natural gas companies to transport or sell gas. The Commission regulates market exit through its authority to grant permission to abandon certificated service (see 15 U.S.C. 717f(b)). In addition, under Sections 4 and 5 of the NGA, 15 U.S.C. 717c and 717d, the Commission regulates the price and other terms of jurisdictional sales and transportation, ensuring that the rates and charges for such service, as well as all rules, regulations, practices, and contracts affecting those rates and charges, are just and reasonable (see 15 U.S.C. 717c(a)).

Section 4(b) of the NGA prohibits natural gas companies from granting "any undue preference or advantage" or maintaining "any unreasonable difference in rates, charges, service, * * * or in any other respect * * *" (15 U.S.C. 717c(b)). Section 5(a) directs the Commission to exercise its remedial authority to eliminate rates or practices that are "unjust, unreasonable, unduly discriminatory, or preferential" (15 U.S.C. 717d(a)). Finally, the Act requires the Commission to evaluate and remedy any anticompetitive behavior by natural gas companies. *E.g.*, *FPC* v. *Conway Corp.*, 426 U.S. 271, 278-279 (1976).

2. Congress altered the operation of the NGA in 1978 when it adopted the Natural Gas Policy Act (NGPA), 15 U.S.C. 3301 *et seq.* That statute was designed "to give market forces a more significant role in determining the supply, the demand, and the price of natural gas." *Transcontinental Gas Pipe Line Corp.* v. *State Oil & Gas Bd.*, 474 U.S. 409, 422 (1986); see also *Public Service Comm'n* v. *Mid-Louisiana Gas Co.*, 463 U.S. 319, 322 (1983) (the NGPA "comprehensively and dramatically" changed the scheme of regulation under the Natural Gas Act).

The NGPA eliminated price regulation of sales of "new" gas, substituting a single scheme of statutory ceiling prices for wellhead sales ("first sales") of natural gas (15 U.S.C. 3301-3333) and a timetable for the gradual decontrol of all wellhead sales (15 U.S.C. 3331). The statute also removed deregulated gas from certificate and abandonment requirements imposed by the Natural Gas Act.[2]

The NGPA also modified regulation of pipelines under the NGA. Section 311(a) of the NGPA, 15 U.S.C. 3371(a), creates an alternative regulatory framework for gas transportation that is designed to promote the development of a unified pipeline transportation network. See H.R. Rep. 95-543, 95th Cong., 2d Sess. 47 (1977). The provision states that the Commission "may" allow interstate pipelines and intrastate pipelines to transport gas for each other, as well as for local distribution companies; any transportation permitted by the Commission under Section 311 is exempted from the certificate and abandonment requirements of the Natural Gas Act (15 U.S.C. 3431 (a)(2)). Section 311 transportation remains subject to the Commission's ratemaking authority (15 U.S.C. 3371(a)(1)(B)) as well as to "such terms and conditions as the Commission may prescribe" (15 U.S.C. 3371(c)).

This revamped statutory scheme has led to a restructuring of the natural gas industry. Prior to the adoption of the NGPA, interstate natural gas pipelines functioned primarily as merchants, buying gas from producers at the "wellhead" and then transporting that gas for resale to the pipelines' customers—

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[2] Section 601 of the NGPA, 15 U.S.C. 3431, coordinates the provisions of the NGPA with the Commission's regulatory authority under the NGA.

local distribution companies that buy gas at wholesale for subsequent resale and large "end users" that buy gas at retail for their own consumption. See Pet. App. 17a; Pierce, *Reconsidering the Roles of Regulation and Competition in the Natural Gas Industry*, 97 Harv. L. Rev. 346, 348 (1983). Since the adoption of the NGPA, however, pipelines have increasingly provided "unbundled" transportation services: local distribution companies and end users buy gas directly at the wellhead from producers and other sellers; the pipelines' role is to transport this "third-party" gas from seller to buyer.

Pipelines generally have provided these transportation services under one of several streamlined authorization procedures that replaced the traditional—and more time-consuming—Section 7(c) certificate proceeding and were designed by the Commission to give pipelines increased flexibility in the provision of transportation services. Under Section 311, the Commission has authorized interstate and intrastate pipelines to provide certain categories of transportation service on a "self-implementing basis"; a pipeline receives a blanket authorization for the provision of transportation services that eliminates the need for advance Commission approval of individual transactions. See 44 Fed. Reg. 52179 (1979). The Commission has established similar streamlined procedures for other categories of transportation services pursuant to its authority under Section 7(c) of the Natural Gas Act, 15 U.S.C. 717f(c). See, *e.g.*, 48 Fed. Reg. 34872 (1983).

B. Order No. 436

1. In early 1985, the Commission published two notices of inquiry stating its intent to explore solutions to certain problems in the provision of trans-

portation services. 50 Fed. Reg. 114 (1985); 50 Fed. Reg. 3801 (1985). One concern identified by the Commission was the pipelines' refusal in certain circumstances to transport third-party gas. Pipelines generally provided this service only to customers capable of switching to alternative fuels. As a result, so-called "captive customers" were generally unable to buy gas at the wellhead because the pipelines would not provide the transportation service needed to move the gas from the seller to the buyer.

Due to a growing surplus in the gas supply in recent years, the price of gas at the wellhead has fallen; the price of gas sold by pipelines, by contrast, has remained relatively high. In response to customers' efforts to obtain transportation services for third-party gas purchased at the wellhead, pipelines have segmented their market: pipelines generally have provided third-party gas transportation services only to those "fuel-switchable" customers that would otherwise leave the pipeline entirely; the pipelines offered sales service—but not transportation service—to the captive customers forced to purchase gas from the pipeline because they could not switch to another fuel source. Pet. App. 20a-23a.

Several months after the Commission issued the notices of inquiry, the United States Court of Appeals for the District of Columbia Circuit vacated and remanded orders establishing two of the Commission's alternative transportation programs. The court held that the Commission had failed to respond adequately to contentions that those programs were unduly discriminatory because transportation services were available only to fuel-switchable customers and not to captive customers. *Maryland People's Counsel* v. *FERC*, 761 F.2d 768 (D.C. Cir. 1985); *Maryland People's Counsel* v. *FERC*, 761 F.2d 780 (D.C. Cir.

1985). Shortly thereafter, the Commission issued a notice of proposed rulemaking proposing to adopt a new rule governing pipelines' authority to provide transportation services (50 Fed. Reg. 24130 (1985)).[3]

2. In October 1985, the Commission adopted Order No. 436, which comprehensively altered regulation of pipeline transportation to take account of the competitive forces unleashed by the NGPA (50 Fed. Reg. 42408). The Commission found that as a result of changes in the natural gas industry accelerated by the removal of price controls mandated by the NGPA, "natural gas has become a separate and distinct economic *commodity* * * * distinct from transportation and distinct from [other pipeline services]" (*id.* at 42412 (emphasis in original)). It stated that the elimination of price regulation of first sales of most natural gas resulted in a "generally competitive market" in that commodity (*id.* at 42413).

The Commission further found that significant changes had taken place with respect to interstate pipeline transportation of natural gas: in some markets two or more pipelines competed against one another; in other markets, however, there remained only a single pipeline supplier. In addition, "the maturing of the pipeline industry in recent decades has meant that there is now an interconnected nationwide pipeline grid" (50 Fed. Reg. 42412 (1985)). The result of these changes was "[a] highly integrated *transportation* network, highly monopolistic in some markets,

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[3] The D.C. Circuit stayed its mandates in the two *Maryland People's Counsel* cases to allow transportation service to continue until the Commission completed the rulemaking proceeding that culminated in the rule at issue in the present case. *Maryland People's Counsel* v. *FERC*, 768 F.2d 450 (D.C. Cir. 1985); *Maryland People's Counsel* v. *FERC*, 768 F.2d 1354 (D.C. Cir. 1985).

fairly competitive in others; over which Congress has generally determined to retain utility-type regulation over market entry, exit and price; but for which Congress has also allowed an alternative approach [under NGPA § 311] in which there may be no restrictions as to market entry and exit, but for which Congress expressly retained regulation as to rates" (*id.* at 42413 (emphasis in original)).

The Commission concluded that it was appropriate to continue regulatory supervision over transportation services, but to do so in a manner that allowed the commodity market for natural gas to develop in a competitive fashion. "In this way, regulation will allow competitive forces to operate in those areas where Congress has determined they will better protect the public interest than traditional utility-type regulation, while retaining the traditional-type regulation in those areas where competitive forces have been found inadequate by the Congress" (50 Fed. Reg. 42413 (1985)).

The Commission also found that natural gas purchasers "seeing the availability of supplies in the field at [lower] prices * * * are seeking to purchase gas directly in the field and have it transported to [them] * * * in competition with the system supplies which the pipeline retains under certain uneconomic long-term contracts" (50 Fed. Reg. 42421 (1985) (footnotes omitted)). However, "pipelines have generally expressed a reluctance to provide these transportation services on a non-discriminatory basis to their existing sales customers or to customers without immediate fuel-switching capability"; they provided such services only to customers capable of abandoning the pipeline in favor of an alternate fuel source (*ibid.* (footnote omitted)). The Commission determined that this discrimination in the provision of transpor-

tation services "impeded the ability of natural gas consumers to secure the rewards of competition in natural gas markets commensurate with the[ir] risks"; in particular, the Commission concluded that consumers had been deprived of the benefit of lower field prices for natural gas because they were unable to obtain transportation for that lower-priced gas. *Ibid.*; see also *id.* at 42424 ("permitting pipelines to unduly discriminate or to exclude certain consumers from transportation services is inconsistent with the fundamental goals of consumer protection and competition in the Natural Gas Act and the Natural Gas Policy Act").

In order to remedy this problem, the Commission consolidated its various alternative transportation procedures into two streamlined procedures: pipelines were authorized to transport gas without prior Commission approval either under Section 311 of the NGPA or under a "blanket certificate" issued under Section 7(c) of the NGA. However, the Commission imposed an "open-access" condition upon pipelines obtaining blanket certificates or providing Section 311 transportation: such pipelines must provide transportation service "without undue discrimination, or preference" (18 C.F.R. 284.8(b)). This condition was designed to prevent pipelines from refusing to transport third-party gas purchased from a seller competing with the pipeline. See 50 Fed. Reg. 42421, 42424-42425, 42430 (1985).

The Commission examined and rejected claims, advanced mainly by pipelines, that the open-access condition exceeded the Commission's authority because it transformed pipelines into common carriers. The Commission concluded that the open-access condition was merely an exercise of the Commission's authority, under Sections 4 and 5 of the NGA, to remedy

undue discrimination and anticompetitive behavior.[4] The Commission stressed that the open-access condition extended only to pipelines that made use of the blanket "self-implementing" authority to provide transportation services set forth in Section 311 of the NGA and the Commission's rules under Section 7(c); the condition does not automatically apply to traditional Section 7(c) certificates authorizing individual transactions. The Commission stated that in the latter situation it would consider on a case-by-case basis whether the open-access condition was necessary to remedy undue discrimination and anticompetitive behavior. The Commission further concluded that, because the open-access condition applied only to those pipelines that chose to utilize the self-implementing transportation authority, it was voluntary, and therefore did not amount to a common carriage obligation. 50 Fed. Reg. 42426-42428 (1985).[5]

The Commission rejected claims that the open-access condition should not be imposed because it would reduce sales of gas by pipelines and therefore increase pipelines' liability to producers under contractual take-or-pay provisions.[6] In the Commission's

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[4] The Commission also found that its broad power to impose conditions upon the provision of transportation services under Section 311 of the NGPA justified the open-access condition. See 50 Fed. Reg. 42428 (1985).

[5] The Commission also adopted ratemaking principles designed to encourage pipelines to offer transportation services on a nondiscriminatory basis (50 Fed. Reg. 42447-42455 (1985)) and required pipelines making use of the blanket transportation authority to allow their customers to adjust contractual obligations to purchase gas from the pipeline (*id.* at 42438-42447). The latter provision allows pipeline gas-purchase customers to obtain transportation service while purchasing gas from other sources.

[6] "Take-or-pay" costs can result when the pipeline's contract with its supplier provides that the pipeline will take a

opinion these contractual problems could be settled among the parties in individual cases and did not justify continuation of unduly discriminatory transportation practices that deprived consumers of access to competitively priced gas. 50 Fed. Reg. 42462-42465 (1985).

Finally, the Commission established an "optional expedited certificate" (OEC) procedure to expedite the issuance of certificates of public convenience and necessity for new pipeline facilities and services pursuant to Section 7 of the NGA (see 50 Fed. Reg. 42467-42476 (1985)). The Commission indicated that the certification process could constitute a barrier to entry into the market for the provision of transportation services. The new procedure is "designed to provide consumers with greater options in the array of gas services available by giving pipelines the ability to offer new service and construct facilities on a timely basis" (*id.* at 42467). The Commission found that, by removing an obstacle to competition, the new procedure would stimulate efficiency in the construction of pipeline facilities and competition in the provision of services to pipeline customers (*ibid.*).

Under the procedure established by the Commission, certificates issued on an expedited basis are sub-

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particular amount of gas or pay for that amount of gas. If the pipeline's sales decrease, the pipeline may not take the required quantity of gas and may be forced to make "take-or-pay" payments to its supplier. If the pipeline does incur take-or-pay costs, these costs generally may be included in the pipeline's rate base; the take-or-pay costs are treated as an investment upon which the pipeline may earn its prescribed rate of return. The typical take-or-pay contract provision then allows a pipeline five years to take delivery of the gas for which it has prepaid. If the pipeline fails to take delivery of the gas within the required period, it has the opportunity to recover prudently incurred take-or-pay costs.

ject to conditions designed to ensure that the economic risk of the project is borne solely by the pipeline and not by ratepayers (see Pet. App. 96a n.32 (summarizing conditions)). In return, the applicant gains the benefit of a rebuttable presumption that the project meets the "public convenience and necessity" standard of Section 7, which obviates the need for a hearing in most cases. Parties who contest the application must raise genuine issues of material fact in order to obtain a hearing. See 18 C.F.R. 157.104.

C. The Decision of the Court of Appeals

The court of appeals upheld most elements of Order No. 436, including the open-access condition and the expedited certificate procedures. As to certain specified issues—including the take-or-pay question—the court directed the Commission to reconsider its determinations. See Pet. App. 1a-128a.[7]

The court of appeals unanimously upheld the factual findings underlying the Commission's order. The court observed that the Commission had found "(a) that pipelines continue to possess substantial market power; (b) that they have exercised that power to deny their own sales customers, and others without fuel-switching capability, access to competitively priced gas; and (c) that this practice has denied consumers access to gas at the lowest reasonable rates" (Pet. App. 30a (citations omitted)). And it found these findings basically unchallenged by the parties seeking to overturn the Commission's order. Indeed, the court observed that the pipelines' claim that the order would prevent pipelines from passing

[7] The court also remanded issues raised by the Commission's decisions to allow customers to adjust their contractual levels of service and to grandfather certain pre-existing transportation arrangements (Pet. App. 123a-124a).

on their own gas purchase costs "tends to substantiate the Commission's views (1) that in the absence of Order No. 436 competition will be thwarted and (2) that the practices controlled by Order No. 436 are indeed anticompetitive and discriminatory" (*id.* at 31a).

The court unanimously rejected the contention that the Commission lacked the statutory authority to impose the open-access condition upon its blanket authorizations for the provision of transportation services. Turning first to the Commission's authority under the Natural Gas Act, the court found that the Commission's broad power to eliminate discriminatory practices authorized the imposition of the open access condition and that this power was not diminished by the fact that the condition bears some resemblance to obligations imposed upon common carriers (Pet App. 25a-34a). The court also found that the Natural Gas Policy Act empowers the Commission to "control discrimination where the effort imposes on pipelines a duty—even though it be a conditional one—equivalent to the common carrier's duty to provide nondiscriminatory service" (*id.* at 35a).

The court of appeals remanded the "take-or-pay" issue to the Commission for further consideration. Various parties argued in the court of appeals that the provisions of Order No. 436, including the open-access condition, would have the effect of decreasing pipelines' gas sales and thereby increasing pipelines' exposure to contractual liability to producers under take-or-pay provisions. These parties asserted that the Commission had failed to give reasoned consideration to a number of potential solutions to this problem.[8] The court of appeals agreed, and directed the

[8] In concluding that the Commission had failed to give reasoned consideration to claims that the open-access condi-

Commission to reconsider the matter. Pet. App. 75a-95a. The court declined to "require that FERC reach any particular conclusion" with respect to this issue, stating that it "merely mandate[d] that [the Commission] reach its conclusion by reasoned decision-making" (*id.* at 94a).[9]

The optional expedited certificate procedure was challenged on a number of grounds in the court of appeals. The court declined to address claims relating to the procedures for the application of the OEC rules, holding that those issues were not ripe for review (Pet. App. 97a-102a).

The court did address the challenges to the Commission's determination that certificate proposals conforming with the rules would be treated as presumptively consistent with the public convenience and necessity; the court upheld this determination by a

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tion would impede the settlement of take-or-pay liability by pipelines and producers the court rejected (Pet. App. 81a) the Commission's reliance on the "voluntary" nature of the open-access condition, holding that the use of the blanket transportation authority might be mandatory for some pipelines.

[9] Judge Mikva dissented with respect to this point, stating (Pet. App. 126a) that the Commission should be required on remand to take some affirmative action to assuage the take-or-pay problem.

Following the court of appeals' remand, the Commission issued an interim rule addressing the issues remanded by the court of appeals, including the take-or-pay problem. See 52 Fed. Reg. 30334 (1987), on reh'g, 52 Fed. Reg. 39630 and 48986 (1987), petitions for review pending, No. 87-4749 (5th Cir. filed Oct. 19, 1987), No. 87-1588 (D.C. Cir. filed Oct. 19, 1987). (Motions to resolve the venue question are now pending before the Fifth Circuit.) At the time it issued the interim rule, the Commission also solicited public comments regarding the appropriate final rule with respect to these issues (see 52 Fed. Reg. 30351 (1987)).

divided vote. The court first rejected the claim that the Commission's presumption "disregards important factors that Congress intended the Commission to consider" in the certification process (Pet. App. 102a). One of the purposes of certification is to " 'prevent uneconomic extensions and waste' " that would burden utilities' ratepayers (*id.* at 103a (footnote and citations omitted)). The court of appeals found that this purpose was not implicated by the presumption, because the presumption may be invoked only where a pipeline's investors bear all of the financial risks of the project; ratepayers cannot be affected adversely by such a project (*id.* at 103a-104a).

The court next concluded that the presumption did not improperly preclude consideration of the possibility that a new service might adversely affect existing firms and their captive customers. The court found that, under the Commission's criteria, applicants were likely to seek to enter a market in which the incumbent firm could lose customers only if the incumbent was inefficient or engaging in price discrimination, because that is the only context in which the applicant could be assured of recouping its investment. "If incumbent-firm inefficiency or price discrimination is the explanation, then certification will result in losses for a firm that, so far as appears, deserves to lose." Pet. App. 104a.

The court noted that in the case of an application to provide services in competition with a local distribution company such "deserved losses" may "ultimately fall not on [the distribution company's] shareholders but on its remaining customers—most notably its captive residential consumers," but it rejected arguments that the Commission's presumption violated congressional intent to the extent that it creates a risk that the local distribution company will be "bypassed" by a competitor (Pet. App. 105a).

First, the court accepted the Commission's view that the risk of bypass is "slight" because the distribution company will be free to compete in the market for the provision of transportation services, thus retaining the ability to earn a return on its fixed costs (*id.* at 105a-106a). Second, state authorities have power to regulate essentially local aspects of a bypass under this Court's decision in *Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Comm'n*, 341 U.S. 329 (1951). The court of appeals stated that that authority, and other options available to the states, would allow states to protect captive customers (Pet. App. 106a-107a). Finally, the court of appeals found that the Commission had adequately reconciled its decision in the present case with earlier decisions attempting to discourage bypass (*id.* at 111a-112a).[10]

ARGUMENT

Based on a comprehensive and detailed analysis of all aspects of Order No. 436, the court below upheld the substance of the order, remanding the matter to the Commission for further consideration of a limited number of specified issues. That thorough decision, upon which we rely, is correct and does not conflict with any decision of this Court or any other court of appeals. Review by this Court is not warranted.

1. The court of appeals held that the open-access condition of Order No. 436 was a proper exercise of the Commission's authority under Sections 4 and 5

[10] Judge Mikva dissented, concluding that the OEC procedure would undermine the ability of state regulatory commissions to subsidize the rates charged to residential and commercial customers through higher rates to industrial users, "a matter of essentially local concern" (Pet. App. 127a). He also disagreed with the majority's conclusion that the Commission had adequately justified its change in policy concerning bypass (*id.* at 127a-128a).

of the NGA to remedy undue discrimination, and that this general authority was properly implemented through the Commission's broad power to impose conditions upon certificates of convenience and necessity issued under Section 7 and its power under Section 16 of the NGA to "prescribe * * * rules * * * necessary or appropriate to carry out the [NGA's] provisions" (15 U.S.C. 717*o*). Petitioners do not dispute either the existence of the practices the Commission found or the Commission's finding that they are unduly discriminatory; rather they claim (87-976 Pet. 7-17; 87-977 Pet. 5-20; 87-979 Pet. 12-26) only that the open-access condition is beyond the Commission's authority because it amounts to the imposition of common carrier status. That claim is without merit and was properly rejected by the court below.

a. The Commission's broad remedial authority under the Natural Gas Act fully supports the imposition of the open-access condition as a remedy for the unlawful discrimination found by the Commission. As the court of appeals observed (Pet. App. 26a), the Natural Gas Act "fairly bristles with concern for undue discrimination." Section 4(b) of the NGA, 15 U.S.C. 717c(b), states that pipelines are "prohibited," in "any transportation" under the Commission's jurisdiction, from (1) "grant[ing] any undue preference or advantage," (2) imposing any "undue preference or disadvantage," or (3) "maintain[ing] any unreasonable differences in rates, charges, services, facilities, or in any other respect." Where the Commission finds that any transportation "practice" by a pipeline is "unduly discriminatory" or "preferential," Section 5(a) of the NGA specifically authorizes—indeed, requires—the Commission to "determine" the practice "to be thereafter observed" by the pipeline (15 U.S.C. 717d(a)). The court below correctly

recognized that "in the NGA Congress * * * [gave] the Commission power to stamp out undue discrimination; it is precisely that power that the Commission has here sought to exercise" (Pet. App. 26a).

The Commission chose to eradicate the unlawful discrimination in this case through its power under Section 7(e) of the NGA, 15 U.S.C. 717f(e), to attach conditions to certificates of public convenience and necessity issued under Section 7(c), 15 U.S.C. 717f(c). Under the open-access condition, pipelines that accept a blanket certificate, and thereby gain the self-implementing authority to transport gas without obtaining prior Commission approval, must agree to provide that transportation service "without undue discrimination or preference." 18 C.F.R. 284.8 (b), 284.9(b). Because the Commission does not review particular transactions under a blanket certificate, the open-access condition provides a necessary "bond of protection" (see *Atlantic Refining Co.* v. *Public Service Comm'n*, 360 U.S. 378, 385 (1959)) against the continuation of the pipelines' unlawful practices. With this carefully crafted measure, therefore, the Commission fulfilled its statutory responsibility to eliminate undue discrimination.

Nothing in the language of the NGA supports petitioner's claim that the open-access condition somehow falls outside the Commission's statutory authority to remedy discrimination. Petitioners instead base their argument entirely upon ambiguous legislative history. That effort, as the court of appeals noted, is "uphill" because " 'courts have no authority to enforce principles gleaned solely from legislative history that has no statutory reference point.' " Pet. App. 25a (citation omitted); see also, *e.g.*, *United States* v. *Locke*, 471 U.S. 84, 95-96 (1985). And the history discussed by petitioners does not support their at-

tempt to restrict the Commission's express statutory authority (see Pet. App. 25a-26a).

The legislative history on which petitioners rely consists of congressional inaction: Congress several times considered, but failed to enact, provisions that would have imposed common carrier status on pipelines (Pet. App. 25a, 26a). As the court of appeals observed, the history at most provides "modest support" for the conclusion that Congress, having declined to impose such a generic rule itself, did not intend the Commission to impose common carrier status "at will" (*id.* at 26a). It suggests no reason at all why the Commission may not impose an open access condition in appropriate factual circumstances as a remedy for undue discrimination and anti-competitive behavior.

The open-access condition, by requiring that pipelines that provide certain transportation services must do so without undue discrimination, serves one of the same purposes as common carriage regulation (Pet. App. 25a-26a). But the open-access condition does not rest on any supposed general power to impose common carrier status but on the power to remedy discrimination under Sections 4, 5, and 7 of the NGA. Therefore, even assuming that Congress intended to preclude the Commission from mandating common carriage "at will," it does not follow that Congress also intended to preclude the Commission from imposing service obligations when necessary to remedy undue discrimination in the "extreme factual circumstances" (Pet. App. 30a) of this case.

Indeed, the legislative history suggests, if anything, that Congress withheld generic common carriage authority because the Commission's remedial authority under Sections 4 and 5 already provided a more precise regulatory tool that could be applied in appropri-

ate factual circumstances.[11] As the court of appeals observed (Pet. App. 26a-27a):

> The issue seems to come down to this: Although Congress explicitly gave the Commission the power and the duty to achieve one of the prime goals of common carriage regulation (the eradication of undue discrimination), the Commission's attempted exercise of that power is invalid because Congress, in 1906 and 1914 and 1935 and 1938 itself, refrained from affixing common carrier status directly onto the pipelines and from authorizing the Commission to do so. And this proposition is said to control no matter how sound the Order may be as a response to the facts before the Commission. We think this turns statutory construction upside down, letting the failure to grant a general power prevail over the affirmative grant of a specific one.

In sum, the legislative background relied upon by petitioners provides "weak—almost invisible—support" (Pet. App. 26a) for their attempt to read out of the statute the Commission's express authority to remedy undue discrimination. Because petitioners have failed to establish anything close to the "clearly

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[11] Petitioners attempt (87-976 Pet. 12; 87-977 Pet. 12; 87-979 Pet. 23) to find a statutory basis for their claim in Section 7(a) of the Natural Gas Act. That provision sets out particular circumstances in which the Commission may order pipelines to enlarge their facilities in order to provide new service. But the open-access condition does not require pipelines to enlarge their facilities; it imposes non-discriminatory transportation obligations *to the limits of a pipeline's capacity to provide service.* See Pet. App. 42a-46a (discussing methods of allocating capacity when a pipeline has more requests for service than it can provide). Nothing in Section 7(a) limits the Commission's authority to require pipelines to provide transportation over existing facilities on terms that are not unduly discriminatory or anticompetitive.

expressed legislative intent" needed to overcome "the plain language of the statute" (*American Tobacco Co.* v. *Patterson*, 456 U.S. 63, 75 (1982)), the court of appeals properly upheld the Commission's interpretation of its statutory authority as reasonable. Pet. App. 34a, citing *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984).[12]

b. The court of appeals also correctly concluded (Pet. App. 34a-39a) that Section 602(b)(2) of the NGPA, 15 U.S.C. 3432(b)(2), poses no barrier to the imposition of the open-access condition upon pipelines that transport natural gas under Section 311 (b)(1) of that statute.[13]

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[12] Petitioner in No. 87-977 is mistaken in its claim (Pet. 7-8) that the court below expanded upon the Commission's own view of its authority by affirming the open-access condition while rejecting the Commission's justification that the condition was voluntary. The Commission, in responding to arguments that the open-access condition amounted to common carriage, first stated (50 Fed. Reg. 42427 (1985)) that the condition properly rested upon its statutory authority to remedy undue discrimination. Because the court affirmed on that basis (Pet. App. 24a-39a), it did not reach the question whether that condition might also be justified as voluntary. Rather, the court addressed the Commission's claim that Order No. 436 was voluntary in a different context and rejected it there for reasons that have nothing to do with the common carriage arguments (see page 14 & n.8, *supra*).

[13] Section 602(b), entitled "Effect on State laws," provides:

> No person shall be subject to regulation as a common carrier under any provision of Federal or State law by reason of any transportation—
>
> (1) pursuant to any [presidential] order under section 3362(c) or section 3363(b), (c), (d), or (i) of this title; or
>
> (2) authorized by the Commission under section 3371(a) of this title.

The court held that Section 602(b) "was a congressional effort to protect § 311(a) from the consequences of pipeline concern that service thereunder would expose them generally to classification as common carriers, most likely by states, and thus to an unprecedented range of legal burdens" (Pet. App. 35a). Without such protection, pipelines might be discouraged from transporting gas under the NGPA, thus defeating "the accomplishment of Congress's purposes" (*id.* at 35a-36a).[14] The court found no indication in the overall statutory scheme of the NGPA that Section 602(b) was intended to limit the Commission's authority to regulate transportation activities under Section 311. Indeed, Section 311(c) specifically states that transportation under that provision "shall be under such terms and conditions as the Commission may prescribe" (15 U.S.C. 3371(c)). To the extent Section 602(b) is relevant at all, it is because Congress foresaw the possibility that the Commission might exercise Section 311(c) authority to impose conditions resembling common carriage. Section 602(b) affirmatively protects a pipeline that decides to provide transportation under those conditions from any possibility that its actions might trigger the imposition of common carrier status under other statutes.

The structure of Section 602(b) supports this interpretation. The provision contains parallel subsections that protect pipelines from common carriage laws "by reason of any transportation" under either (1) presidential orders in emergency situations (see 15 U.S.C. 3432(b)(1)) or (2) Commission authori-

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[14] The court noted (Pet. App. 36a) that "[t]hough we have not identified similar federal hazards, we believe that Congress might well have included the reference to federal law out of anxiety that some overlooked federal provision would operate to thwart § 311's purposes."

zation under Section 311(a) (see 15 U.S.C. 3432 (b)(2)). Noting that "[t]he President's emergency powers are extremely broad," the court below found it "hardly credible that § 602 would stand in the way" of the imposition by the President of duties similar to common carriage if such action were necessary in emergency conditions. "By the same token, that section must not flatly bar the Commission from imposing similar conditions on gas transportation under § 311." Pet. App. 37a.[15]

c. Contrary to petitioners' assertions (87-976 Pet. 7-9, 12-14; 87-977 Pet. 10-14; 87-979 Pet. 9-12, 21-26), no decision of this Court or of another court of appeals conflicts with the determination of the court below that the Commission has the authority to impose the open-access condition under the Natural Gas Act and the NGPA. The cases on which petitioners rely address attempts to impose common carriage-like requirements under other statutory schemes, none of which provided express statutory authority to remedy undue discrimination.

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[15] There is no basis for the claim (87-976 Pet. 14; 87-977 Pet. 9-10; 87-979 Pet. 6) that the Commission's interpretation of Section 602 in the present case conflicts with an earlier interpretation set forth in 44 Fed. Reg. 52179, 52180-52181 (1979). The matter before the Commission in the earlier case was a request that it compel interstate pipelines to provide transportation services to distributors under Section 311. The Commission found nothing in the statute or the legislative history indicating that it had authority to require the provision of such services. The Commission did not there address the issue in this case: the scope of its authority to require that pipelines *already providing* Section 311 transportation service do so without undue discrimination or anticompetitive behavior. Therefore, the Commission's determination in that proceeding does not conflict with its conclusion here (50 Fed. Reg. 42429 (1985)) that Section 602(b) "does not sweep so broadly as to license unduly discriminatory rates or practices."

First, petitioners err in relying (87-976 Pet. 7-9; 87-977 Pet. 5-6; 87-979 Pet. 9-12) upon this Court's decision in *FCC* v. *Midwest Video Corp.*, 440 U.S. 689 (1979). The Court held in that case that a rule promulgated by the Federal Communications Commission requiring operators of cable television systems to offer channels for public use was barred by Section 3(h) of the Communications Act, 47 U.S.C. 153 (h), which specifically prohibits the agency from treating broadcasters as common carriers. There is no such prohibition in either the Natural Gas Act or the NGPA. Moreover, *Midwest Video* did not present the central question posed here—whether such a rule might be justified as a remedy for unduly discriminatory and anticompetitive practices. For these reasons the question addressed in *Midwest Video* does not at all resemble the issue in this case. See Pet. App. 27a.

Petitioners also seek to rely (87-976 Pet. 13-14; 87-977 Pet. 10-14; 87-979 Pet. 17-23) upon a series of cases involving Commission authority under the Federal Power Act, 16 U.S.C. (& Supp. IV) 791a *et seq.* In *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973), this Court upheld a lower court decision that an electric utility had violated the antitrust laws by refusing to transmit or "wheel" electric power. The Court rejected the utility's claim that its actions were immune from the antitrust laws because they were subject to regulation by the Commission under the Federal Power Act, holding that the Act gave the Commission only "limited" authority to order wheeling and left enough room for voluntary action by the utility to warrant application of the antitrust laws. 410 U.S. at 373-375.

Otter Tail Power Co. is plainly distinguishable from the present case. To begin with, the Federal Power Act does not give the Commission certificate

and abandonment authority over the interstate transmission of electricity; there is accordingly no equivalent to Section 7 of the Natural Gas Act, upon which the Commission based the open-access condition in this case. Second, as the court of appeals observed (Pet. App. 28a), the legislative history of the Federal Power Act discussed by this Court in *Otter Tail Power Co.* is "materially different" with respect to common carriage. When it adopted that statute, Congress considered and rejected a provision that would have specifically empowered the Commission to order wheeling to further the public interest. See *Otter Tail Power Co.*, 410 U.S. at 374. As we have discussed, Congress did not specifically eliminate the power to impose common carriage-like requirements at the time that it adopted the Natural Gas Act.[16]

These factors also distinguish the various decisions of the courts of appeals concerning the scope of the Commission's authority to order wheeling under the Federal Power Act (see 87-976 Pet. 13 n.12; 87-977 Pet. 12-14; 87-979 Pet. 21-25). Moreover, none of those cases presented the question whether the Commission could order wheeling to remedy undue discrimination or anticompetitive behavior (see Pet. App. 28a-30a).[17] The decision in this case therefore

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[16] Petitioners in No. 87-979 argue (Pet. 18-20) that the legislative histories of the two statutes are identical, but they rely on the provisions of a 1935 bill that was never reported out of committee (see Pet. App. 25a). Because the entire bill simply died in committee without being reported, it is impossible to conclude that Congress intended to limit the Commission's broad remedial authority. This legislative history is plainly different from that of the Federal Power Act, where Congress specifically deleted the relevant provisions at the time it adopted the statute and explained that it was doing so in order to limit the Commission's authority.

[17] In *Florida Power & Light Co.* v. *FERC*, 660 F.2d 668, 677-678 (5th Cir. 1981), cert. denied, 459 U.S. 1156 (1983),

does not conflict with the decisions cited by petitioners.

2. Other petitioners, producers of natural gas, claim (87-978 Pet. 9-23) that the court of appeals erred in remanding Order No. 436 to the Commission for reconsideration of the take-or-pay issue. The court of appeals held (Pet. App. 94a) that the Commission failed to provide a sufficient explanation of its decision to take no affirmative action to alleviate problems allegedly caused by take-or-pay contracts. In the view of these petitioners (87-978 Pet. 12, 15-21), the Commission sufficiently explained that decision in Order No. 436 and the court should have affirmed. This claim does not justify review by this Court.

The question whether the Commission sufficiently considered the take-or-pay question in Order No. 436 has absolutely no significance beyond this case. Indeed, these petitioners appear to be motivated by concern that the Commission might adopt one of the proposed solutions to the take-or-pay problem that

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the court specifically reserved the question whether the Commission could order wheeling to remedy undue discrimination (see Pet. App. 27a-28a). In a somewhat different vein, the court in *New York State Electric & Gas Corp.* v. *FERC*, 638 F.2d 388 (2d Cir. 1980), cert. denied, 454 U.S. 821 (1981), held that, where Congress had specified certain procedural and substantive prerequisites before the Commission may order wheeling (see 16 U.S.C. (& Supp. IV) 824j, 824k), the Commission must satisfy those prerequisites before requiring wheeling as a remedy for anticompetitive behavior. The Natural Gas Act does not contain any procedural prerequisites applicable in the present case.

Finally, petitioner in No. 87-979 errs in claiming (Pet. 21-23) that the decision by the court of appeals in this case conflicts with the decision in *Central West Utility Co.* v. *FPC*, 247 F.2d 306 (3d Cir. 1957). That case involved limitations imposed by Section 7(a) of the Natural Gas Act; as noted above (see note 11, *supra*), that provision does not apply to the open-access condition.

the court of appeals directed the Commission to reconsider on remand. But the propriety of those solutions may be considered in review proceedings following the Commission's decision with respect to this question.[18]

3. Although the optional expedited certificate rules were challenged in the court of appeals by a large number of parties, only one local distribution company, Southern California Gas Company (SoCalGas), has raised the matter in this Court (No. 87-1091). And SoCalGas merely renews arguments that the court below properly rejected either on the merits or on the ground that the claims were premature and hypothetical.

a. SoCalGas argues, as it did in the court of appeals, that the Commission has "turn[ed] its back" on the standards of Section 7 of the Natural Gas Act by adopting a presumption that the public convenience and necessity will be satisfied if a proposal is structured in accordance with specified standards (87-1091 Pet. 5-7); that the OEC rules represent an unjustified and unexplained departure from the Commission's "historic policy" of discouraging pipelines from "bypassing" local distribution companies in order to directly serve industrial customers (*id.* at 7-9); and that the OEC rules are invalid because they will

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[18] Petitioners are mistaken in suggesting (Pet. 9, 17) that the mandate of the court of appeals binds the Commission's discretion on remand. On the contrary, the court below specifically declined to direct any particular course of action on remand (Pet. App. 92a, 94a) and expressly preserved the possibility that the Commission might reaffirm its decision regarding the take-or-pay issue (*id.* at 94a). Indeed, the latter aspect of the majority's decision drew a dissent from Judge Mikva who stated (*id.* at 126a) that the Commission should be required to take affirmative action respecting the take-or-pay issue.

require the Commission to approve such bypass arrangements without giving due consideration to the impact on captive customers (*id.* at 14-15). None of these claims has any merit and each was properly rejected by the court of appeals.

In the first place, as the court of appeals noted, it is "far too late in the history of administrative law" to suggest that a regulatory agency cannot establish by rulemaking the criteria it will apply in evaluating whether to grant certificate authority. Pet. App. 102a-103a n.34, citing *FPC* v. *Texaco Inc.*, 377 U.S. 33 (1964); *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956); and *National Tour Brokers Ass'n* v. *ICC*, 671 F.2d 528 (D.C. Cir. 1982).

The court of appeals thoroughly considered—and properly rejected—petitioner's challenges to the merits of the rule (see Pet. App. 102-111a). The court found (*id.* at 104a) that because the criteria selected by the Commission promote competition in the interstate transportation of natural gas, they must be viewed as "an experiment designed to realize the congressional scheme, not to defeat it." In addition, because the rules place all economic risk on the pipeline seeking the optional certificate, they do not depart from the Commission's traditional policy against bypass, which essentially sought to avoid burdening consumers with costs attributable to unnecessary duplication of facilities (*id.* at 111a-112a).

Finally, petitioner's claim that the rules preclude adequate consideration of the effects of bypass on "captive" customers is undercut by provisions in the rules themselves requiring actual notice by the OEC applicant to affected local distribution companies and state statutory agencies. 18 C.F.R. 157.102(b)(1)(iv). Moreover, the court of appeals found that re-

lief on a bypass claim might well be available from state regulators (Pet. App. 105a-111a).[19]

b. SoCalGas also argues (Pet. 9-10) that its complaints about the procedures set forth in the OEC rules—*i.e.*, that the rules impermissibly shift the burden of proof from the applicant to opposing parties, and that the presumption established by the rules will be "conclusive" in practice and not rebuttable—are ripe for review.

The court of appeals correctly determined, under the two-pronged test of *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967), that these procedural challenges are not ripe for review. First, by their very nature, complaints about burden of proof and the operation of presumptions will be better illuminated in a concrete factual setting. See Pet. App. 100a-101a. Furthermore, SoCalGas faces no immediate harm as a result of the postponement of review; nor is it called upon to change its "primary conduct" in reliance on the rules, see *Toilet Goods Ass'n* v. *Gardner*, 387 U.S. 158 (1967). See Pet. App. 101a-102a. There will be an opportunity, on review of any decision granting a certificate under the OEC procedure, for SoCalGas to challenge the Commission's application of the new rules.

In any event, SoCalGas's premise is false: the presumption established by the rules need not be "conclusive" (87-1091 Pet. 10). As the court of appeals stated (Pet. App. 109a (emphasis added)):

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[19] Moreover, this claim regarding the consideration to be devoted to bypass claims under the Commission's new procedures, like the other procedural challenges raised by petitioner, is best left for resolution until after the OEC rules are applied in a concrete factual situation. See pages 29-30, *infra*.

> the presumption created by the OEC procedures *is* rebuttable. We cannot know at this point precisely what will be necessary to persuade the Commission that application of the presumption is inappropriate. But the existence of that backdrop confirms our judgment that the OEC rules themselves can readily be applied in a manner consistent with the congressional purposes.

c. Petitioner also argues (87-1091 Pet. 11-14) that because the Commission and the court of appeals assumed that states retain authority to regulate local aspects of bypass under *Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Comm'n*, 341 U.S. 329 (1951), this Court should now "clarify" the exact scope of such state authority to ensure that a "regulatory gap" does not result from the OEC rules.

This Court held in *Panhandle* that a state regulatory commission could assert certificate authority over local facilities proposed by a pipeline company to directly serve industrial customers already being served by a local distribution company. SoCalGas would have this Court go much further, and provide guidance on the precise reach of state authority under *Panhandle*.[20] But this Court "do[es] not sit to decide hypothetical issues or to give advisory opinions about issues as to which there are not adverse parties before [it]." *Princeton Univ.* v. *Schmid*, 455 U.S. 100, 102 (1982).

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[20] The court of appeals acknowledged that the "exact scope" of the states' authority to regulate local aspects of bypass is "unplumbed," but concluded that the issue was not properly before the court, and that, in any event, the *Panhandle* case "clearly tends to undermine petitioners' assault on the Commission's refusal to except bypass situations from the OEC procedures, insofar as that assault turns on assumptions of total state incapacity to address the issue" (Pet. App. 106a).

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

CATHERINE C. COOK
General Counsel

CHARLES FRIED
Solicitor General

JEROME M. FEIT
Solicitor

JOHN N. ESTES III
FRANK R. LINDH
Attorneys
Federal Energy Regulatory Commission

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